

Executive Summary And Preliminary Analysis Ohio EPA BUMP

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Executive Summary

The Ohio EPA is under a federal court order to update the Clean Water Act mandated Areawide Plan for water quality protection in the Blacklick Creek Watershed (BUMP). Last week, the Ohio EPA released a draft Blacklick plan dated December 7, 2001 that is at odds with the wastewater treatment service plan in the Columbus Metropolitan Facilities Plan Update and specifically rejects a ban of alternative wastewater treatment systems. Ohio EPA's draft plan substitutes its judgment for the decisions reached by a broad collaboration of entities and reflected in the Metropolitan plan. While the draft plan only addresses the Blacklick Watershed, the plan suggests that the approach taken by the Ohio EPA will be expanded to the remainder of the Columbus Metropolitan Facilities Planning Area.

If the draft plan is adopted, it will result in significant negative impact on the environmental and economic health of Central Ohio as well as provide a catalyst for a fundamental shift away from the regional, comprehensive planning that has served Central Ohio well. The Ohio EPA draft plan:

- **Disregards the locally designed plan.** Ohio EPA requested that the City of Columbus facilitate a regional wastewater planning process, at great expense in both rate-payer funds and stakeholder time. The resulting Metropolitan plan is widely accepted within the region, protective of water quality and technically feasible. Yet, the Ohio EPA has disregarded that plan, substituting Ohio EPA staff judgment for the judgment of those entities that will be required to implement the plan and that will be served by it. (See Preliminary Analysis pp. 4-7.)
- **Does not take into account the policy decisions of the overwhelming majority of Central Ohio.** Collaborative efforts to address regional wastewater treatment needs resulted in a plan supported by the representatives of the overwhelming majority of stakeholders within the planning area including: City of Bexley, Village of Canal Winchester, City of Columbus, City of Dublin, City of Gahanna, City of Grove City, Village of Groveport, City of Hilliard, Village of New Albany, Village of Obetz, City of Pickerington, City of Reynoldsburg, Village of Riverlea, Village of Shawnee Hills, City of Upper Arlington, City of Westerville, Southwest Licking Community Water & Sewer District, Fairfield County and the Mid-Ohio Regional Planning Commission. (See Preliminary Analysis pp. 4-7.)
- **Does not recognize the superiority of centralized sewers.** It is widely recognized that large, regional, centralized sewer systems are environmentally preferable to small package plants. This fact has been recognized by Congress,

by the Ohio Supreme Court, by U.S. EPA and by Ohio EPA. Yet Ohio EPA's draft plan fails to encourage this choice. (See Preliminary Analysis pp. 8-11.)

- **Promotes alternative wastewater treatment systems.** Despite the availability of centralized sewers throughout the planning area, billions of dollars of public investment in centralized sewers, the opposition of the representatives of the overwhelming majority of residents, the predominance of unsuitable soils, and the current lack of regulations governing the operation of alternative wastewater treatment systems, Ohio EPA's draft plan promotes alternative wastewater treatment systems in Central Ohio. (See Preliminary Analysis pp. 8-11.)
- **Inserts the Ohio EPA into annexation.** Ohio EPA, an agency with a mission of protecting the environment, is proposing to consider annexation issues in its permitting decisions. The annexation public policy debate is more appropriately addressed in other forums; in fact, the General Assembly has recently amended Ohio annexation law. (See Preliminary Analysis pp. 11-12.)
- **Imposes new and ambiguous planning requirements on municipalities.** Ohio EPA is imposing burdensome facility planning requirements in order for a municipality that contracts with the City of Columbus for treatment services to continue to serve its existing customers. (See Preliminary Analysis pp. 12-16.)
- **Will prevent municipalities from serving newly annexed territory.** Under the draft plan, a municipality will be unable to annex and provide wastewater treatment services to new territory until the municipality completes facility planning that has been reviewed and approved by the Ohio EPA. After March 2003, a municipality's authority to provide service to its present customers, even inside of its own corporate boundaries, will expire absent an Ohio EPA approved facility plan. (See Preliminary Analysis pp. 16-19.)
- **Discourages regional collaboration.** Rather than promote collaboration and consensus building with a regional plan, Ohio EPA's plan will create a race by each individual jurisdiction to submit a costly, redundant facilities plan in order to claim disputed territory, while unjustifiably interfering with municipalities right to provide service. (See Preliminary Analysis pp. 19-21.)
- **Is inconsistent with the Clean Water Act.** The draft plan does not meet the requirements of Section 208 of the Clean Water Act, and is inconsistent with the goals of the Act. It is not a prescriptive plan that establishes how wastewater treatment needs are going to be met. Instead, it is a "plan to plan." (See Preliminary Analysis, pp. 21-22.)
- **Ignores the historical failure of non-centralized systems in the region and Columbus' strong record of abating those failures with flexible policies.** The City of Columbus has delivered responsible wastewater planning and implementation to the Central Ohio Region for decades. (See Preliminary Analysis, pp. 22-23.)

Preliminary Analysis

I. Introduction

When Congress adopted the Clean Water Act in 1972, it incorporated a requirement for comprehensive planning in sections 208 and 201 of the Act. Congress envisioned that the “208 Plan” (also known as an “Areawide Plan”) would provide a “road map” to achieve the overall goal of water quality protection -- “fishable and swimmable” waters throughout the Nation. A 208 or Areawide Plan must address many items, including stormwater, open space, and recreation opportunities. One of the primary items that must be included in an Areawide Plan, however, is the identification of the wastewater treatment needs for the area for a 20-year period and an assessment of how those treatment needs will be met. The 208 or Areawide Plan must also identify a Designated Management Agency (DMA) to carry out the wastewater treatment requirements of the Areawide Plan. The assessment of wastewater treatment needs is a 201 plan (also known as the “facility plan”). In order to support the integrity of the 208 Plan, Congress required that individual permits and grants for wastewater treatment, as proposed by 201 or Facilities Plans, be consistent with the 208 Plan.

In some areas of Ohio, there are designated Areawide Planning Agencies which are responsible for developing 208 or Areawide plans. In Central Ohio, there is no designated Areawide Planning Agency, so Ohio EPA is responsible for this planning. The Ohio EPA has been under a federal court order since 1996 to accomplish this planning in the Blacklick Watershed, a geographic area that encompasses portions of eastern Franklin County and portions of adjacent counties. Since 1974, Columbus has been a Designated Management Agency and has been responsible for planning for the wastewater treatment needs within the Columbus Metropolitan Facilities Planning Area in a manner that is consistent with the 208 or Areawide Plan. Over the last 20 years Columbus has submitted numerous Facilities Plans and updates to Ohio EPA and U.S.EPA, as it built and upgraded its treatment facilities. These Facilities Plans established a Facilities Planning Area boundary that includes almost all of Franklin County and portions of adjacent counties. The Blacklick Watershed is entirely inside of the Columbus Metropolitan Facilities Planning Area.

II. Initial Review of the BUMP

- A. Ohio EPA requested that the City of Columbus facilitate a regional wastewater planning process, at great expense in both rate-payer funds and stakeholder time. The resulting wastewater plan for the Columbus Metropolitan Facilities Planning Area is widely accepted within the region, protective of water quality, and technically feasible. Yet, the Ohio EPA has disregarded that plan, substituting Ohio EPA staff judgment for the judgment of those entities that will be required to implement the plan and that will be served by it.**

Wastewater planning for the Columbus area began with the submittal of the Original Columbus Metropolitan Facilities Plan in 1976. U.S. EPA prepared an Environmental Impact Statement (EIS) on that plan which was completed in 1979. The EIS contained recommendations that differed from the recommendations of the Original Facilities Plan. Resolution of these differences continued through 1984, when the City submitted a Plan of Study, which set the groundwork for the first facilities plan update. The first Columbus Metropolitan Area Facilities Plan Update was submitted to Ohio EPA in December 1984, and a Revised Facilities Plan Update supplemented that document in September 1985.

During review of the Revised Facility Plan Update, a number of potentially significant environmental impacts were identified. These included: impacts expected from the fulfillment of the population projections and development for the planning area and the induced growth and secondary environmental effects of expanded treatment capacity. After review of the EIS for the Revised Columbus Metropolitan Area Facilities Plan Update, the U.S. EPA concluded that the cost-effective, environmentally sound alternative for meeting the wastewater treatment needs in the Columbus Facilities Planning Area was the upgrade and operation of the City of Columbus' two wastewater treatment plants, Jackson Pike and Southerly. The U.S. EPA also concluded that upgrading the existing wastewater facilities as proposed in the facilities plan update would accommodate the sustained projected growth in the Columbus Metropolitan Area. The City of Columbus has been implementing this plan for the past fifteen years.

In 1999, the City of Columbus, as well as other local jurisdictions, became concerned that the use of alternative wastewater treatment plants inside of the Columbus Metropolitan Facilities Planning Area would undermine the existing centralized system, cause environmental degradation, and promote sprawl. The Ohio EPA advised the City of Columbus to update its Facilities Plan again to address this concern. The Ohio EPA also advised that this work product would be used by Ohio EPA to complement and be incorporated into the Areawide Plan

that Ohio EPA was required to do for the Blacklick Watershed. The City of Columbus undertook this facilities plan update and submitted it to the Ohio EPA over one year ago, on November 9, 2000.

Typically once a submittal to the Ohio EPA is deemed to be complete and approvable, the Ohio EPA approves it. In this case, upon determining that the plan update is complete and approvable, the Ohio EPA would certify it to the U.S. EPA, as the wastewater treatment component of the 208/Areawide Management Plan, amending the State Water Quality Plan.

When the City of Columbus began this process, Columbus asked the Ohio EPA Central District Office for guidance regarding what was expected from the City for a complete and approvable plan update. Mike Galloway, Environmental Supervisor in the Ohio EPA Central District Office, indicated that Ohio EPA Central District Office had not had a great deal of experience in updating facilities plans and that Keith Riley of the Northeast District Office should be the City's guide. The City had numerous conversations with Mr. Riley and reviewed available draft guidance documents. Additionally, on July 20, 2000, City staff updated Ohio EPA staff from the Central District Office, the Division of Environmental and Financial Assistance, and the Division of Surface Water on the process the City was using to update the plan, the format and content of the draft product, and the City's timeframe for completing the work. At that time, the City requested confirmation that it was proceeding in accord with the Ohio EPA's request and expectations. On August 1, 2000, Division of Surface Water Chief Lisa Morris confirmed our process and work product by a letter in which she observed:

Under the federal Clean Water Act, state and local officials are required to complete long-term planning to address water pollution. Since many local governments, including the City of Columbus, conducted extensive planning in the 1970's and 1980's there is now a growing need to update these plans to reflect the current situation and the vision for future community growth and sewer service need. Over the past 2 years, Ohio EPA has been urging all governmental entities with sewer and wastewater treatment responsibilities (a Designated Management Agency [DMA]) to update their Facility Plans.

Chief Morris' letter further stated that the City's efforts to complete the requested facility plan update and Ohio EPA's more localized Blacklick Creek Water Quality Management Plan update were complementary, not competing or duplicative efforts. She directed Columbus to proceed with its planning effort using the following principles.

- 1) The City of Columbus is the DMA within the Columbus Metropolitan Facilities Planning Area (FPA). As the DMA, the City is responsible for identifying how wastewater treatment needs are going to be met in a manner that protects existing and future water quality and is most

responsive to the desires of local officials and communities. Ohio EPA fully supports efforts by the City to produce a Facilities Plan Update that addresses the wastewater needs within the Columbus Metropolitan FPA for the next 20 years.

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- 4) If requested by the City, Ohio EPA will also certify the entire Columbus Facility Plan Update within the same time frame [as the BUMP]. Once U.S. EPA approval is obtained, the Columbus Metropolitan Facility Plan Update will serve as the official master plan for providing sewer and wastewater treatment needs within the facility-planning boundary. By law, Ohio EPA must disapprove sewer or wastewater treatment projects that conflict with an approved 208 plan (e.g. the State Water Quality Management Plan).
- 5) Original FPA boundaries – The original Section 208 plan for the Scioto River basin established a specific geographic area for the Columbus Metropolitan Facility Plan. The City has a responsibility to involve other governmental jurisdictions and stakeholders in assessing the sewer and wastewater treatment needs for an area within the established FPA; however, the City, as the appointed DMA, should make final decisions within the FPA.

Based on the Ohio EPA's guidance and direction, the City's submittal is complete when it includes: a map of existing sewer services within the planning area, 20 year population projections for the planning area, acceptable wastewater options prescribed for the remaining undeveloped areas within the planning area, documentation of public participation and stakeholder involvement, and endorsements from any other DMAs which have overlapping territory within the planning area. Within both the entire Columbus Metropolitan Facilities Planning Area, including the proposed expansion, and the Blacklick Creek Watershed all current DMAs (Canal Winchester, Westerville, and Groveport) have endorsed the Columbus Metropolitan Facilities Plan Update. The Columbus Metropolitan Facilities Plan Update, using the identified criteria, is complete.

The plan update would be "approvable," as long as it is technically feasible and protective of water quality. With regard to its protection of water quality, the plan update builds upon the uncontroverted U.S. EPA decision in 1988 that the cost-effective, environmentally sound alternative for meeting the wastewater treatment needs in the Columbus Facilities Planning Area is the operation of the City of Columbus' two wastewater treatment plants. With regard to technically feasible, several months after the Columbus Metropolitan Facilities Plan Update was submitted, Ohio EPA staff questioned whether the plan update was "implementable" because the City of Columbus does not currently have service

agreements for all of the areas designated in the plan update to be served by Columbus (or another central sewer provider.) Ohio municipalities, however, do not need to have service agreements in order to serve persons living outside their municipal corporate limits. The Ohio Constitution specifically provides that a city has the right to acquire, own and operate public utilities. See Ohio Constitution, Article XVIII, Section 4. In addition, section 6 of Article XVIII allows a city to sell its surplus utilities to "others." This provision allows (but does not require) cities to sell water and sewer services to nonresidents. See e.g. *Fairway Manor, Inc. v. Summit County Board of Commissioners* (1988), 36 Ohio St. 3d 85; *VMJ Company v. City of Lorain* (1957), 105 Ohio App. 166. In making such sales, the city may impose whatever limits it believes appropriate. *City of Stow v. City of Cuyahoga Falls* (1982), 7 Ohio App. 3d 108; *Joslyn v. Akron* (1958), 77 Ohio Laws Ads. 370. A municipality thus has the ability to sell sewer services directly to nonresidents, absent any service contract with another governmental entity. In addition, Ohio Revised Code sections 719.01 and 719.02 support this authority by granting a city the power to condemn property outside its limits for the purpose of providing service to nonresidents. *City of St. Marys v. Dayton Power and Light* (1992), 76 Ohio App. 3d 526.

Using this plan update process, the Columbus Metropolitan Facilities Plan Update gained the endorsement of representatives of over 80% of the population within the Facilities Planning Area. The Ohio EPA has suggested that if there is not 100% agreement on a plan, then it cannot be adopted. While Columbus was committed to creating as much consensus as possible, it is unrealistic to think that complete consensus on all points is possible. Columbus solicited comments from all stakeholders, responded to each comment within the plan update submittal, and then considered those comments in writing the final plan update. The Ohio EPA is the areawide planner for Central Ohio. While other areawide planning agencies have found it necessary to arbitrate between competing DMAs, there is no such disagreement among DMAs inside of the Columbus Metropolitan Facilities Planning Area and the overwhelming majority of stakeholders, as determined by the action of their representatives, have endorsed the plan.

Why would Ohio EPA staff substitute its judgment for the judgment, after a collaborative planning process, of those entities which will be required to implement the plan and for those who will be served by it?

B. Despite the availability of centralized sewers throughout the planning area, the recognized superiority of central systems, the significant public investment in centralized sewers, the opposition of the representatives of the overwhelming majority of residents, the predominance of unsuitable soils, and the current lack of regulations governing the operation of alternative wastewater treatment systems, the Ohio EPA draft plan promotes alternative wastewater treatment systems in Central Ohio.

In November 2000, the City of Columbus submitted to Ohio EPA its Facilities Plan Update (November 2000). This plan embodies the City facilitated proposal for addressing wastewater treatment needs inside the existing Columbus Facilities Planning Area ("FPA"). The Columbus Metropolitan Plan Update proposes a ban on alternative systems in Central Ohio. The Plan Update includes a lengthy explanation of its position. (See pp. 22 –31 of "Response to Comments." Reasons for opposing such systems within the FPA include the following:

- Alternative systems are inappropriate in urban areas such as Central Ohio where centralized sewers are available;
- The existing enormous investment in centralized wastewater treatment infrastructure is undermined;
- Alternative systems encourage the development of suburban densities in areas that do not have the infrastructure (e.g. roads, schools, parks, fire and police protection) to support the densities;
- Much of the land inside the FPA is ill suited for such systems, either because of hydric soils or existing field tiles;
- Alternative systems are not regulated by Ohio EPA, other than the initial Permit To Install - - there are no operating permits or operating rules for such systems.

In addition to the wide support and endorsement the overall plan has received, the following stakeholders have provided explicit support for a land application system ban:

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| • Village of Canal Winchester | • Village of Groveport |
| • Central Ohio Sierra Club | • City of Hilliard |
| • Darby Creek Association, Inc. | • Village of New Albany |
| • City of Dublin | • Village of Obetz |
| • Fairfield County | • City of Reynoldsburg |
| • City of Gahanna | • Village of Shawnee Hills |
| • City of Grove City | • City of Westerville |

The regional plan's supporters represent more than 80% of the people who live within the FPA. The *Columbus Dispatch* has published two editorials urging that alternative systems be banned in Central Ohio (August 23, 2000; September 17, 2000). Additionally, the Mid Ohio Regional Planning Commission has voted overwhelmingly to support the Columbus Metropolitan Facilities Plan Update.

Despite the broad-based support for a ban on alternative systems, the Ohio EPA draft plan does not include such a ban; to the contrary, it encourages such systems. Much of the language in the plan actually treats alternative systems as being on par with centralized sewers, despite the Clean Water Act's preference for regional centralized systems. Specifically, the section of the plan entitled "Options for Areas Which Are Planned to Be Sewered" treats the two available alternatives (connection to centralized sewers and building a new alternative system) as equal. (See pp. 43-44.) With regard to centralized sewers, the plan states that:

If development of an undeveloped area is anticipated, and it is **adjacent** to a regional wastewater collection and treatment system, then the local entity responsible for providing wastewater treatment to the undeveloped area (i.e., a county, a sewer district, etc.) **MAY** choose to install sewers and connect to the regional system for conveyance and treatment of the wastewater generated, or the regional wastewater treatment entity **MAY** elect to extend its sewer system into the undeveloped area and provide the wastewater collection itself.

(Emphasis added). The plan goes on to offer alternative wastewater treatment systems as an equally valid option:

In some areas, such as where regional sewer service may not be readily available, **or inter-municipal service agreements or annexation cannot be agreed upon**, more innovative wastewater treatment solutions may be appropriate. For example, a cluster development with adequate land area available might choose to collect its wastewater, treat it locally, and then dispose of it through land application to a golf course or similar, suitable land area.

(See pp. 43-44, emphasis added.) This same message is also found on page 34:

Based on existing sewer service areas (see Figure 6), central sewer service for developing areas in the northern part of the watershed could be provided by the Village of New Albany or the Licking or Delaware County sewer districts, in the central portion of the watershed by Gahanna, Columbus, Pataskala, Jefferson Water and Sewer District, Southwest Licking County Water and Sewer

District or Franklin County, and in the southern part of the watershed by Columbus, Groveport or Fairfield County. **Alternatively, unincorporated areas could be served by new local treatment facilities or by on-lot treatment systems, depending on development densities and local soil and environmental conditions.**

(Emphasis added.) See also page 43 which lists four equal options for areas with failing aerator systems; regional sewer service and service by a package plant or alternative system are treated as equal options.

While these paragraphs treat alternative systems and centralized sewers as being equal options despite the recognized superiority of central systems, the plan actually is more favorable to alternative systems. The Ohio EPA's preference for alternative systems is revealed in the details of the required facilities planning. Ohio EPA's requirements for universal facilities planning are discussed in detail below. These requirements include two additional requirements that are only applicable to the extension of certain centralized sewers. Specifically, the facilities planning requirements include a mandate that entities that are discharging "outside" the Blacklick watershed (i.e., Columbus, Pickerington and Southwest Licking) must address the impact of extending their systems on stream hydrology in the Blacklick. In addition, the required facilities plans must also address the impact of development on water quality - - but only for the extension of centralized sewers. In other words, facilities plans that propose extending Columbus' systems (either by Columbus or by a contracting suburb) or Pickerington system must address two additional criteria that alternative systems do not need to address.

While providing a higher hurdle for centralized sewer providers, Ohio EPA provides no explanation for its rejection of the Metropolitan proposal to ban alternative systems, other than to note, in Appendix 6, that "there is considerable difference of opinion within the professional wastewater treatment community as to the wisdom of such a prohibition." Ohio EPA does not address why it is rejecting a policy choice supported by the vast majority of the area for which it is planning. Nor does Ohio EPA ever state that the Metropolitan plan, with its strong emphasis on centralized sewers, is not environmentally protective. Indeed, it would be difficult for Ohio EPA to make such a claim. Regionalized sewers have long been recognized as the superior technology for Central Ohio. See section C below. In fact, in the draft plan, Ohio EPA notes in passing that regional systems are generally preferable. (See p. 41.)

The plan requires that any provider of wastewater services be a Designated Management Agency. This requirement does not make it less likely that alternative systems will be proposed and approved. All of the entities that have proposed such systems for housing developments in Central Ohio or are likely to propose such systems (i.e., the counties, Citizens Utilities, and/or Jefferson

Water and Sewer District) are already DMAs according to the plan. Thus, the requirement that the entity proposing to install an alternative system be a DMA is not an impediment. Nor does the additional planning required of DMAs for alternative wastewater treatment present a substantial hurdle. In short, there is nothing in the plan that overtly discourages alternative systems but there are additional hurdles for centralized sewer providers.

In short, Ohio EPA has inexplicably disregarded a planning choice supported by the elected and appointed officials representing the vast majority of people living in Central Ohio without explanation.

C. The Ohio EPA plan inserts the Agency into annexation. The Ohio EPA, an agency with a mission of protecting the environment is proposing to consider annexation issues in its permitting decisions. The annexation public policy debate is more appropriately addressed in other forums; in fact, the General Assembly has recently amended Ohio annexation law.

Centralized sewers have long been considered the environmentally sound choice in Central Ohio. As the Ohio Supreme Court stated:

The social and environmental consequences of ignoring the crucial role of centralized wastewater treatment in the development of the Columbus metropolitan area cannot be overstated. In particular, the remarkable improvement in the Scioto River south of the Columbus Southerly and Jackson Pike facilities, *id.* at 5, is as much a function of local as of federal investment. This local share, based as it is on the contributions of the numerous ratepayers of the Columbus system, allows Columbus to spread the cost of needed improvements over many customers and to achieve the economies of scale necessary to invest in advanced treatment technologies. n20 The use of package facilities throughout the area currently served by the Columbus system or within its planning area would not only degrade the receiving stream but would undermine the financing of state-of-the-art technology on a regional basis. Accordingly, any consideration of social or economic criteria pursuant to Ohio Adm.Code 3745-1-05 must take account of the objective of the Clean Water Act that rivers and streams are not to be conduits for wastewater. This is particularly the case where a well-constructed network for transmitting domestic sewage is available.

Columbus and Franklin County Metropark District v. Shank (1992), 65 Ohio St.3d 86. As discussed above, Ohio EPA's decision to reject a requirement for centralized sewers in favor of alternative systems is not explained in the draft plan. Ohio EPA's justification does not rest on any alleged lack of available

centralized sewers in the area. In fact, the plan specifically states that “[c]entral sewer service can be provided to most of the anticipated future development areas within the watershed simply by extending collection systems from existing sewer lines.” (See p. 38.) In other words, the plan acknowledges that centralized sewers are largely available, but nonetheless encourages alternative systems.

Ohio EPA’s purpose is revealed in its discussion of areas that are going to be developed at densities that require sewers. Rather than simply require that such areas utilize one of the seven providers of sewer service in Central Ohio, the Ohio EPA states that such areas may choose to install an alternative system if “inter-municipal service agreements or annexations cannot be agreed upon.” (See p. 44.) This choice is available no matter how close an appropriately sized centralized sewer is to the area. Under this language, alternative systems could be built literally on the borders of the municipalities in Central Ohio.

Annexation is simply not an appropriate consideration for Ohio EPA to use in an environmental planning document. U.S. EPA has long acknowledged that annexation is a matter of local concern. See U.S. EPA’s 1980 Memo entitled “Annexation as a Prerequisite for Wastewater Treatment Services” (“Annexation is a local issue to be decided in accordance with State and local laws.”) It is wholly inappropriate for Ohio EPA to attempt to insert itself into this local planning issue. The Ohio General Assembly recently debated and determined Ohio’s annexation laws. It is not appropriate for the Ohio EPA to revisit this issue.

The elected and appointed officials representing the overwhelming majority of Central Ohio strongly support banning alternative wastewater systems in Central Ohio. Inexplicably, Ohio EPA’s draft plan does not. Instead, it adopts the minority view, and treats alternative systems as being on par with centralized sewers, and does so for reasons that are completely inappropriate.

D. The Ohio EPA plan imposes new and ambiguous planning requirements on municipalities. Ohio EPA is imposing burdensome facility planning requirements in order for a municipality that contracts with the City of Columbus for treatment services to continue to serve its existing customers.

Columbus has been involved in facilities planning for more than 20 years. Columbus has written or updated various plans repeatedly. See Columbus’ Facilities Plan’s Response to Comments, pp. 47-49 for a list of Columbus facilities planning documents. These documents are generally tied to the construction or modification of a major facility, i.e., an interceptor or plant upgrade. Most recently, Columbus completed the November 2000 Columbus Metropolitan Facilities Plan Update, which more generally describes how wastewater treatment needs are to be met in Central Ohio. While facilitated by

Columbus and developed in consultation with all stakeholders, Columbus' contracting communities pay for these plans through their payment of rates to Columbus. Moreover, the planning efforts support the contracting communities, as often Columbus writes a plan to justify a major interceptor that will be used in part or in whole to support a contracting community. In other words, since the 1970's, Columbus has borne the burden of major facilities planning for itself and for its contracting suburbs.

Ohio EPA is now proposing a major shift in this historic and appropriate relationship. In the Ohio EPA plan, the Agency creates a new and lengthy list of DMA's. It then requires each DMA to draft and submit a facilities plan by March 2003. There are numerous and serious problems with Ohio EPA's approach.

First, it is unclear how Ohio EPA derived its list of DMA's. The list (found on page 40 of the draft plan) includes entities such as Franklin County, Pataskala, and Licking County that do not appear to have any collection or treatment facilities inside of the Blacklick Watershed. In addition, it fails to include other entities that do have facilities in the watershed, namely several mobile home parks and the Winding Hollow Country Club. What criteria did Ohio EPA use to determine what entity should be a DMA? Why wouldn't the mobile home parks and other facilities be DMAs under this method?

Second, historically, facilities planning has been linked to building or modifying major new facilities. Ohio EPA has completely removed this link, instead requiring every community to develop a facilities plan regardless of whether any major facilities are being proposed. The list of DMA's includes:

- New Albany
- Gahanna
- Columbus
- Reynoldsburg
- Pickerington
- Pataskala
- Groveport

If Ohio EPA adopts the same approach for the rest of the Scioto Basin Areawide plan, this list will include virtually every community in Central Ohio. Ohio EPA never explains what the point is of requiring all of these entities to perform "facilities planning" even if they are not planning on building any new major facilities.

Moreover, Ohio EPA is requiring a thorough facilities planning document, including a basic analysis of the appropriate alternatives. Columbus and its contract communities already performed that level of facilities planning in 1988. At that time U.S. EPA agreed that:

The cost-effective, environmentally sound alternative for meeting the wastewater treatment needs in the Columbus facilities Planning Area is the two-plant alternative.

(See U.S. EPA's Record of Decision, September 27, 1988.) Neither Columbus nor its contracting communities should now be required to further justify this alternative, i.e., use of centralized sewers within the Facilities Planning Area.

Third, the requirement for mandatory facilities planning only applies to Central Ohio. We are not aware of any other areawide plan that requires every community, even those with sewers only, to submit a facilities plan. Ohio EPA has recently certified the plan for northeast Ohio, and it contains no such requirement. As discussed in the next section, there are real and substantial threats associated with this facilities planning requirement; to apply these only in Central Ohio is unjustified.

Finally, Ohio EPA's draft plan includes new and ambiguous elements that must be included in the facilities planning. The most troubling is a requirement that the facilities plans must address water quality impacts - - but only for those entities proposing to extend centralized sewers. Specifically, the plan states that facilities plans should include:

A description of the steps that will be implemented to minimize the impacts on water quality **when central sewer service is provided to an area**. The provision of central sewer service should not threaten or result in degradation to existing water quality, either as a result of direct alteration of streams, their tributaries and associated stream corridors, including riparian zones; or through adverse changes in either or both the quantity and quality of storm water runoff as a result of the development served.

Local controls (such as ordinances) that adequately protect streams and their riparian areas from development-related impacts that could result from the provision of sewer service should be in place before service proposals will be incorporated into the BUMP. This can be accomplished by the development and implementation of sufficient storm water management controls through Phase II Storm Water Management planning, discussed below. Such proposals must also meet Ohio EPA's antidegradation rule requirements

(See p. 41, emphasis added). It is unclear why this requirement only applies to centralized sewers. Currently, there is a high rate of growth in Central Ohio occurring both with and without sewers. The sections of the plan that discuss water quality issues surrounding development mention items such as the "hardening" of surfaces, culverting of streams, etc. Does Ohio EPA believe that development that is occurring without sewers does not have negative water quality impacts? What evidence supports this conclusion? The impact of this

requirement is to make it easier to propose a new alternative facility rather than extend centralized sewers.

Moreover, what is actually being required of centralized sewer providers is unclear. It seems to imply that a community can simply rely on its Phase II program to comply with this requirement. However, the draft plan is rife with statements that imply more is required. Specifically, Phase II does not mandate that a community adopt ordinances that protect riparian corridors or address other land planning uses. Rather, Phase II merely requires a community to address post construction stormwater run-off. Best Management Practices (BMPs) may include riparian corridor protection and/or other zoning efforts; however, a community could comply with Phase II without these controls. In the plan, however, the importance of such land use controls is repeatedly emphasized, and spoken of in the disjunctive with storm water controls. For instance, on page 21 the Ohio EPA notes that it has previously determined that “successful stream protection may be achieved through the implementation of construction site and storm water BMPs, the maintenance, or reestablishment, of permanent wooded riparian corridors on the mainstem and all Blacklick Creek tributaries, and the avoidance of any direct channel modification” and further notes that without such protections the water quality in the Blacklick may decline “beyond the point of full restorability.” Likewise on page 37, the draft plan lists the adverse impacts caused by development, including stream disturbances such as the removal of riparian vegetation, and states that “without appropriate measures to control and prevent these adverse development impacts, no amount of careful sewer system planning and implementation will be sufficient to protect Ohio water quality standards within the streams that compromise the Blacklick Creek watershed.” Protecting riparian buffers is also mentioned on page 38. Moreover, under “Implementation” on page 48, the draft plan again speaks of addressing “development-related impacts on water quality” and the Phase II requirements in the disjunctive, as if they are two separate things. All of these references raise the question of whether Ohio EPA intends to mandate zoning and/or riparian buffer legislation as a condition of extending central sewers.

Even if Ohio EPA means to require nothing more than what Phase II will require, not all of the communities listed as DMA's are subject to Phase II stormwater planning. According to the plan, Ohio EPA has not yet determined what areas and municipalities are subject to Phase II. See e.g. page 28, noting that the entities subject to Phase II have not been fully determined; page 37, noting that based on the 2000 census, it is “expected” that all of the Blacklick watershed will be subject to Phase II. In fact, U.S. EPA's December 8, 1999 final rule on the applicability of Phase II does not include all of the entities listed as DMA's under the plan. Specifically, New Albany, Pickerington and Pataskala do not appear in either Appendix 6 or 7 of that rule. Moreover, Columbus was subject of Phase I, and is therefore not covered by Phase II. Ohio EPA appears to be imposing additional stormwater planning on municipalities that may not otherwise be

subject to Phase II. Again, this only appears to apply in Central Ohio and to centralized sewer providers.

There are also non-municipal DMAs that do not appear to have any jurisdiction over zoning issues, for instance, Citizens Utilities and Jefferson Water and Sewer District. Does this mean that these entities can extend sewers and or build new treatment plants without addressing the water quality issues raised in the plan? If so, how are the goals of the plan to be fully realized?

Ohio EPA's desire to address nonpoint source water quality issues is commendable, and is an important part of areawide planning. However, the recently certified plan for Northeast Ohio addresses this worthy goal by *encouraging* communities to adopt appropriate land use regulations. Ohio EPA could do the same for Central Ohio. Instead, it has chosen to adopt a requirement for such planning, while providing little detail on the extent of the requirement, and also, as discussed below, providing an extremely heavy hammer for not meeting the requirement. Applying this approach only in Central Ohio and only to municipalities offering centralized sewer services is simply unfair.

- E. The Ohio EPA plan will prevent municipalities from serving newly annexed territory. Under the draft plan, a municipality will be unable to annex and provide wastewater treatment services to new territory until the municipality completes facility planning that has been reviewed and approved by the Ohio EPA. After March 2003, a municipality's authority to provide service to its present customers, even inside of its corporate limits, will expire absent an Ohio EPA approved facility plan.**

From the moment the plan is adopted, municipalities will be unable to annex and provide wastewater treatment services to new territory until the municipality completes facility planning that has been reviewed and approved by the Ohio EPA. Not only does the plan create an unprecedented planning requirement, it then subjects Central Ohio communities to a severe punishment if the planning is not completed to Ohio EPA's satisfaction - - no PTI's or loans for any new sewers or treatment plants. The practical impacts of this approach are staggering.

Ohio EPA is proposing to impose completed and approved facilities planning as an absolute requirement to providing service to an area. The draft plan states:

Under the BUMP, municipal wastewater treatment service can be provided to an area only by an entity who has done the facilities planning described below, in Section A.2, submitted the planning for review by Ohio EPA and, as a result of Ohio EPA's approval of

the planning, has been designated through this water quality management plan with the responsibility to serve that area.

(See p. 39.) The plan further specifies that facilities plans are due March 10, 2003 (less than a year after the date Ohio EPA intends to finalize the plan). To cover the interim, the plan states that Permits To Install (PTI) will be approved until March 10, 2003 for projects to be initiated no later than December 31, 2003, but only for areas “within their current corporate boundaries, or within areas for which they have already contracted to provide service.” (See p. 39.) While the City of Columbus has “contracted to provide service” to municipalities if and when the municipality grows into their designated growth area, the municipalities have not contracted with anyone to provide such service. Thus, until a municipality obtains an approved facilities plan, it cannot extend services beyond its “current corporate boundary.”

Any entity that does not have an approved facility plan after March 10, 2003 cannot obtain a new PTI for new sewer projects and, under the language of the plan, is no longer authorized to provide municipal wastewater treatment service to its existing customers. According to state and federal law, Ohio EPA may only issue PTIs and NPDES permits if the permits are consistent with the plan. After March 10, 2003, no permit will be consistent with the plan if it is not submitted by an entity that has an approved facility plan for the area proposed to be served. In other words, if any Central Ohio communities fail to submit a facilities plan, or if Ohio EPA thinks the plan is inadequate, or if Ohio EPA simply fails to act on a submitted plan, then that community cannot extend its sewers - - not even in its own corporate limits.

The likelihood that the practical effect of this policy will be to create a de facto connection ban is substantial. First, as discussed above, the planning effort Ohio EPA is requiring is unprecedented; Central Ohio communities will not have examples of acceptable plans to utilize. The plan's discussion of what is required is not very detailed, increasing the likelihood that communities will spend some amount of time struggling with how to write the plans.

Second, Ohio EPA could easily change its mind about the criteria. Two years ago, Ohio EPA asked Columbus to update its facility plan. Columbus sought, on numerous occasions, guidance regarding the necessary components and process, which Ohio EPA provided. Columbus met with Ohio EPA while it was drafting the plan, submitted a draft plan before the plan was finalized, and then submitted a final plan in November 2000. As part of the process, and in accordance with Ohio EPA's advice, we sought input from all of the affected stakeholders in Central Ohio in a lengthy and involved stakeholder process. Before finalizing the plan, Columbus contacted over 70 stakeholders, held more than 30 stakeholder meetings, distributed 200 cd-rom presentations, provided each public library in Franklin County with the draft plan, created a website for the plan with email comment capability, and televised a 90 minute presentation

eight different times. This public outreach was quite successful. It generated numerous comments, and significant modifications to the final plan. The public outreach was also successful in terms of building consensus among many interested stakeholders. Fifteen municipalities representing more than 80% of the population of the FPA endorsed the final plan. Environmental and business groups have expressed support for the plan. We formally submitted this plan to the Ohio EPA in November of 2000. Columbus has not received any comment letters, notice of deficiency or other action on its plan. Instead, Columbus is simply being told its "initial planning efforts will be useful" in completing a new plan with new criteria on March 10, 2003. (See p. 40.) This "moving target" makes this massive planning effort more difficult.

Third, there is an inevitable delay between plan submittal and plan approval that is very problematic. Pursuant to the terms of the draft plan, any PTI's that are not approved before March 10, 2003 cannot be acted on until Ohio EPA approves the affected city's facility plan. Ohio EPA's track record for approving such plans is not great. As noted above, the Metropolitan plan has not been acted on for more than a year. The Governor just certified a plan from the northeast Ohio. That review and approval took slightly more than a year, and it was a single uncontroversial plan. In the draft plan, Ohio EPA is requiring thirteen separate plans that are likely to have major contradictions between them. Lengthy delays, during which no permits can be issued, are inevitable.

Finally, in addition to being concerned about why the Ohio EPA seeks to impose an ill-defined and more cumbersome process upon this region, Central Ohio is concerned that Ohio EPA is choosing to create a new and burdensome program at a time when Ohio EPA's permitting backlog is so pronounced and it is unable to meet its statutory obligations. A recent report by U.S. EPA noted the significant (27%) Ohio EPA backlog in NPDES permitting. U.S. EPA cited resources and staffing as one of the reasons for the backlog. Ohio EPA does not dispute this finding. That backlog is evident in Central Ohio. According to the plan, there are eight municipal wastewater treatment plants in the Blacklick watershed (including 2 mobile home parks). Only 2 of these 8 have current NPDES permits. Columbus, by far the largest discharger in Central Ohio, had a permit that expired in 1998, more than three years ago. Ohio EPA is also significantly behind on its issuance of TMDLs. According to a recent lawsuit filed against U.S. EPA by Ohio environmental groups, Ohio EPA has only issued one TMDL (of the 881 it has identified that it needs to do). Ohio EPA originally estimated that it would complete its TMDL work by 2013. On August 1, 2001, Ohio EPA notified US EPA that, due to budget constraints, it would not be able to complete the TMDLs until "about" 2023. In fact, the Ohio EPA is completing this plan now because it is under a federal court order for its noncompliance with Clean Water Act planning requirements.

At a time when Ohio EPA is having trouble meeting its statutory obligations because of budget and staffing constraints, Ohio EPA's decision to create a new

regulatory program is troubling. Historically, facilities plans have been required when a DMA or other entity is proposing a major project - - a new wastewater treatment plant, for instance, or a major interceptor. This is still the case in Northeast Ohio, where DMA's only need to submit a facilities plan if they are seeking a change in the areawide plan. Only in Central Ohio will every community be required to submit a plan, not to justify a major project, but simply to maintain their ability to serve their corporate territory. It could be considered unwise for Ohio EPA, already unable to meet its statutory obligations, to create such a requirement.

F. The Ohio EPA plan discourages regional collaboration. Rather than promote collaboration and consensus building the Ohio EPA plan would create a race by each individual jurisdiction to submit costly, redundant facilities plans in order to claim disputed territory, while unjustifiably interfering with municipalities right to provide service.

The draft plan contains provisions that could severely impede municipalities' ability to provide service. In fact, if the plan had been adopted by Ohio EPA 20 or 30 years ago (and if the plan is legal, a point we do not concede), many of the sewers that Columbus has built, which have supported the growth of Columbus and the other municipalities in Central Ohio, would have been much more difficult to build.

The draft plan creates thirteen "provisional" DMAs. Those DMAs are allowed to continue to serve as DMA's inside of their current corporate boundaries until March 10, 2003. After that time, the Ohio EPA must recertify a DMA for it to be able to continue to serve an area; the recertification would be based on the facilities planning described above.

For the provisional DMAs, the plan states that the DMAs are designated to provide service "either within their current corporate boundaries, or within areas for which they have already contracted to provide service." (See p. 31.) The plan does not explain what it means by "corporate boundaries" or how that term will apply to non-municipal DMA's.

More importantly, this would limit municipal DMAs to serving only the area within their political boundaries or areas where they have an agreement to serve. Columbus has long provided service in unincorporated areas without a contract because Columbus routinely offers sewer service as part of acquiring easements through unincorporated territory. When Columbus builds a sewer to serve either a suburb or a portion of Columbus, it often has to travel through unincorporated territory. Although Columbus has legal authority to use eminent domain to acquire needed easements, it prefers to acquire the easements voluntarily. One incentive it offers is sewer service to the property owner. Columbus offers this service without a contract with either the county or the township, and has, over

the years, provided service to hundreds of homes in this manner. If the plan had been in place at the time these sewers were constructed, the City would have had to either not provide service to these homeowners or had to enter into negotiations with the County to do so. Either alternative would have made building the sewer more difficult without increasing the environmental benefit to the community. Indeed, to the extent that hundreds of homes would not have been provided sewer service, this provision actually harms the environment.

Nor are these problems abated when (or if) municipalities become permanent DMA's as a result of having their facilities plans approved. The draft plan is unclear about what area a DMA is supposed to plan. At one point, the draft plan states that the counties are "responsible for addressing wastewater treatment issues" in the unsewered areas. (See p. 22.) Does this mean that the counties have the exclusive right to plan for these areas? Further into the document, Ohio EPA appears to be suggesting that every DMA should decide for itself what area it wants to serve, and, if there are conflicts between the plans, they will be reviewed on a "first in, first reviewed basis." (See p. 33.) In other words, if there are areas in Central Ohio (which there are) where more than one treatment plant could provide service, Ohio EPA is not proposing to resolve that conflict by consensus, or by determining what is environmentally (or fiscally) superior. Instead, Ohio EPA intends to award the area to the entity that gets its facility plan in first.

As a practical matter, this could mean that a DMA (for instance Citizens Utilities or the County) could propose to build an alternative system right on a municipality's borders, and, if the plan is submitted first and contains all of the essential elements, then that territory would become the territory of the non-municipal DMA. This would be true even if the territory were already in an exclusive growth area established by a suburban contract. This would also be true even if there were a centralized sewer already in or planned for that territory.

Historically, a DMA has been given a specific FPA, and told to plan accordingly. That is still true in Northeast Ohio's plan, for wastewater treatment DMAs. The draft plan appears to be a dramatic departure from this historic practice.

Moreover, the draft plan seems to imply that a DMA can only plan for an area if it has "the necessary inter-municipal service agreements." See page 33. However, cities are not required to have "inter-municipal" contracts before they provide service. In fact, as Columbus has previously told Ohio EPA, the City has a right under the Ohio Constitution to provide service outside its territory. See e.g. *Fairway Manor, Inc. v. Summit County Board of Commissioners* (1988), 36 Ohio St. 3d 85. To the extent that the plan requires such contracts before it will allow a city to provide service, the plan is interfering with a city's constitutional utility authority.

Moreover, requiring the City to obtain such contracts will only impede the City's ability to provide centralized sewers to suburbs and other remote areas. As noted above, many major sewers have been built, with service to the landowners, without such agreements.

G. The Ohio EPA plan is inconsistent with the Clean Water Act. The draft plan does not meet the requirements of Section 208 of the Clean Water Act, and is inconsistent with the goals of the Act. It is not a prescriptive plan that establishes how wastewater treatment needs are going to be met. Instead, it is a "plan to plan."

Section 208 of the Clean Water Act requires the Governor to annually certify areawide waste treatment management plans. See Section 208(b)(3). In the case of Central Ohio, Ohio EPA is the areawide-planning agency. The State is therefore under an obligation to both write the plan and to certify it annually; however, the State has not certified an areawide plan for central Ohio in years. As a result, in 1992, Reynoldsburg filed suit against the State and U.S. EPA. This suit resulted in a consent decree that was filed in 1996. The consent decree required the State to prepare and certify, by December 29, 2001, an areawide plan that "includes all of the elements specified in §208(b)(2)(A), (E) and (H). See 1996 Consent Decree in *Reynoldsburg v. Browner* (see Ohio EPA's BUMP webpage (<http://www.epa.state.oh.us/dsw/mgmtplans/BUMP.html>)).

Ohio EPA is not in compliance with the Reynoldsburg Consent Order for two reasons. First, it is going to miss the December 29 deadline. More fundamentally, the draft plan does not contain the elements required under the Consent Order, or by the Clean Water Act.

Section 208 requires an areawide plan to include:

- an identification of treatment works necessary to meet the anticipated needs of an area;
- the identification of the measures necessary to carry out the plan, the timing of the plan, the cost of the plan, and the economic, social and environmental impacts of the plan; and
- an identification of construction-related sources of pollution and the methods to control such sources.

These elements, and the rest of Section 208, confirm that an areawide plan is supposed to be an action plan; it is supposed to provide a roadmap to how certain items (including treating wastewater) are going to be met.

The draft plan is not a prescriptive plan that establishes how wastewater treatment needs are going to be met. Instead, it is a "plan to plan." It makes every political jurisdiction a DMA, even if the entity has no treatment facilities. It

further provides that any newly created DMA may propose anything with regard to how wastewater treatment needs are going to be met.

The Facilities Plan Update submitted by Columbus contains actual prescriptions and a definite plan for how wastewater treatment needs are going to be met. The Metropolitan plan correctly notes that the entire area within the FPA may be served by one of the existing wastewater treatment providers in the area, and therefore requires any newly developing areas that desire centralized sewers to connect to an existing plant. This is consistent with section 208 - - and it is also consistent with the goals of the Clean Water Act to promote regionalized sewers over numerous package plants, and to promote water quality.

In rejecting the Metropolitan plan, Ohio EPA has not substituted a competing, equally specific plan. Ohio EPA's plan simply extends the planning period and shifts the burden of planning onto the shoulders of the newly designated DMA's. This is neither good planning nor consistent with the Clean Water Act.

H. The Ohio EPA plan ignores the historical failure of non-centralized systems in the region and Columbus' strong record of abating those failures with flexible policies. The City of Columbus has delivered responsible wastewater planning and implementation to the Central Ohio Region for decades.

Columbus has "been there" to rescue "pockets of pollution." When Franklin County found, in 1988, that it could no longer operate its numerous, scattered package plants serving unincorporated areas throughout the County, the City of Columbus expanded the County contract areas and agreed to treat the wastewater from those areas without requiring annexation. Additionally, there exist numerous instances in which older developments in the unincorporated areas of the County were built using on-site sewage systems such as septic tanks, aerators and leach fields. Many of these systems have failed or are failing. Failing systems contribute pollution to the surrounding drinking water wells, watercourses and storm sewers. The City of Columbus has offered to treat wastewater collected and conveyed from these areas by the Franklin County Sewer District without requiring annexation so that this sewer district can provide centralized sewers to replace failing systems. The elimination of failing on-site systems is in the best interest of the citizens of Columbus and of Central Ohio.

The City of Columbus' two wastewater treatment plants, Jackson Pike and Southerly, have won awards annually for their superior records of environmentally protective operation. As a result, the water quality for Scioto River below the outfall for the plants has dramatically improved – to the point that the Ohio EPA has been considering whether it should be re-designated an exceptional warmwater habitat, the highest water quality rating in Ohio. The Ohio Supreme Court has stated: "The social and environmental consequences

of ignoring the crucial role of centralized wastewater treatment in the development of the Columbus metropolitan area cannot be overstated.”

The Columbus Metropolitan Wastewater system has been at the core of the Central Ohio Region’s economic strength for decades. Through negotiated growth areas with municipalities, the system supports environmentally sound, planned growth. Through existing contracts with Franklin County the City is available to serve areas near the urban center of our region.

The City of Columbus has stepped forward as a planner and implementer of superior wastewater treatment services for this region. It has rescued failed non-centralized systems. It has been a steadfast resource to our community for responsible wastewater services to the Central Ohio Region for decades.